Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 2000

ECOBAN FINANCE LIMITED,

Petitioner,

-against-

GRUPO ACERERO DEL NORTE, S.A. DE C.V.,

Respondent.

ECOBAN FINANCE LIMITED,

Petitioner,

-against-

ALTOS HORNOS DE MEXICO, S.A. DE C.V.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether, in light of this Court's decision in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), the United States Court of Appeals for the Second Circuit erred in affirming the dismissal of Petitioner's complaints on the ground of "international comity" where Petitioner's complaints sought a remedy "at law" only and did not seek equitable or discretionary relief.

2.

Whether the courts below erred in holding that, in a case in which the District Court's subject-matter jurisdiction was based upon the diverse citizenship of the parties, New York state law, rather than federal law, governed the question of dismissal on the ground of "international comity."

3.

Whether the dismissal of Petitioner's complaints on the ground of "international comity" *with prejudice* should be reversed where (a) the foreign proceedings in question have not adjudicated Petitioner's claims on the merits and (b) such foreign proceedings may be discontinued before any such adjudication takes place.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, petitioner Ecoban Finance Limited (a private non-governmental corporation) certifies that SK Global America, Inc. is the registered owner of Ecoban Finance Limited. No publicly held company owns 10% or more of the stock of Ecoban Finance Limited.

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PETITION FOR A WRIT OF CERTIORARI

Pursuant to 28 U.S.C. § 1254, Ecoban Finance Limited, plaintiff and appellant below, respectfully petitions this Court for a writ of certiorari to issue to the United States Court of Appeals for the Second Circuit to review that court's judgment of January 12, 2001, which affirmed the dismissal of Petitioner's claims on the ground of "international comity."

OPINIONS BELOW

The Summary Order of the Second Circuit, dated January 12, 2001, is reproduced at pages 14a-16a of the Appendix ("App.") and is reported in table form at 242 F.3d 364. The Memorandum and Order of the United District Court for the Southern District of New York, dated August 8, 2001, is reproduced at pages 1a-11a of the Appendix and is reported at 108 F. Supp.2d 349.

JURISDICTION

Judgment was entered by the Court of Appeals on January 12, 2001. *See* App. At 12a-13a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Petitioner Ecoban Finance Limited ("Ecoban") is a New York corporation that provides trade-related financing to banks and other businesses in less-developed countries. Both Respondents are Mexican corporations. Respondent Altos Hornos de Mexico, S.A. de C.V. ("AHMSA") is Mexico's largest steel producer. Respondent Grupo Acerero del Norte, S.A. de C.V. ("GAN") is AHMSA's corporate parent. Ecoban is the holder of $15,000,000 (principal amount) in promissory notes issued by GAN and is the holder of another $3,000,000 (principal amount) in promissory notes issued by AHMSA. All of the promissory notes are in default.

On October 19, 1999, Ecoban commenced two actions in the United States District Court for the Southern District of New York against GAN and AHMSA, respectively, to recover upon the defaulted promissory notes. Petitioner's claims were based exclusively on state law causes of action, sought legal relief only, and did not seek an equitable or discretionary remedy. The District Court's subject-matter jurisdiction in both actions was premised on the amount in controversy and the diverse citizenship of the parties. *See* 28 U.S.C. §1332(a)(2).

Each of the promissory notes contains a non-exclusive forum selection clause by which the issuer (GAN or AHMSA) agreed to submit to the jurisdiction of either a federal or a state court in New York City. Each Respondent also agreed that in any such action, the promissory note would be governed by and construed in accordance with New York law. App. at 1a.

Both Respondents appeared generally after being served with process as directed by the District Court. In their answers to Petitioner's complaints, neither Respondent contested the District Court's subject matter or personal

jurisdiction, the venue of the proceedings, service of process, or the sufficiency of service of process.

After issue was joined in both cases, Petitioner moved for summary judgment. Petitioner's motions were supported by affidavits as required by Fed. R. Civ. P. 56(e) and were essentially undisputed.[1] Respondents cross-moved pursuant to Fed. R. Civ. P. 12(c) to dismiss Petitioner's complaints on the ground of "international comity." The basis of Respondents' cross-motions was that in May 1999, they each had commenced a "suspension of payments" ("SOP") proceeding under Mexico's *Ley de Quiebras y Suspensión de Pagos* ("Law of Bankruptcy and Suspension of Payments") (the "LQSP").[2]

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[1] In opposition to Petitioner's motion for summary judgment, Respondents submitted affidavits by their counsel questioning the significance of endorsements by third parties that appeared on certain promissory notes. Counsel queried whether Ecoban was in fact the "holder" of those notes. However, because Ecoban had indisputably "reacquired" the notes in question, this issue was immaterial as a matter of law. *See* N.Y. U.C.C. § 3-208 (McKinney's 1991).

[2] Under the LQSP, a "suspension of payments" proceeding is not a "liquidation" and does not involve a marshalling of assets or a distribution to creditors. There is no liquidator and no trustee. Rather, the debtor (who need not be insolvent) simply ceases meeting its obligations and files a pro forma petition to commence a SOP proceeding. When the petition is granted, all debts are converted to Mexican pesos, interest ceases to accrue, and all debt service is suspended. While its creditors remain thus in "suspense" — typically for from several to ten or more years — the debtor is free to run its business under the surveillance of a "sindico," who reports to the court, but has no fiduciary duties and no control over the debtor's activities.

Significantly, neither Respondent commenced an ancillary bankruptcy proceeding under 11 U.S.C. § 304, and neither the United States nor Mexico intervened in support of Respondents' motion for dismissal on the ground of "international comity."

Petitioner received notice and filed a protest at the time that both "suspension of payment proceedings"[3] were commenced; however, Petitioner did not assert any claim based upon the promissory notes in either AHMSA's or GAN's "suspension of payments" proceeding until some two and four and one-half months, respectively, after Petitioner had commenced the actions in New York. Petitioner thus filed for recognition of its claims in Mexico as a matter of prudence and in light of deadlines imposed by the Mexican courts. No judgment has been entered in Mexico with regard to either such prudential claim filing. Moreover, a debtor may emerge from an SOP before any judgment regarding claims is rendered.

Mexican observers regarded the LQSP as "the worst law ever enacted in the history of Mexico," M.R. Rowat, J. Astigarraga, *Latin American Insolvency Systems, A Comparative Analysis,* World Bank Technical Paper No. 433, p. 65 (April 1999) (footnotes omitted), and it was repealed by the Mexican government in May 2000, while the parties' cross-motions were pending in the District Court. Under Mexican law, however, that repeal was not retroactive, and so did not affect Respondents.

[3] AHMSA's petition is before a local judge in Monclova, State of Coahuila; GAN's petition is before a different judge in Mexico City.

The Orders of Attachment

On October 28, 1999, after notice and a hearing, the District Court issued orders of attachment pursuant Fed. R. Civ. P. 64 and Article 62 of the New York Civil Practice Law and Rules. Under New York law, the orders of attachment operate only against Respondents' assets within the Court's jurisdiction. In the Second Circuit, neither Respondent filed a cross-appeal from the orders of attachment.

The Decisions Below

Holding that the "decision, whether or not to grant comity, is to be determined under New York state law," App. at 5a, the District Court granted Respondents' motions to dismiss on August 8, 2000, based solely on "international comity." The District Court also ruled that all other motions were moot, including Petitioner's motions for summary judgment, and vacated its orders of attachment. App. at 11a. Judgments of dismissal were entered in both cases on August 11, 2000. App. at 12a-13a. Because the judgments did not provide otherwise, under Fed. R. Civ. P. 41(b) they operated as an "adjudication upon the merits."

Petitioner appealed both judgments to the United States Court of Appeals for the Second Circuit, which, after consolidation, affirmed the District Court in a Summary Order dated January 12, 2001. The Summary Order states in relevant part:

> Plaintiff Ecoban Finance Limited appeals from an order of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, D.J.), dismissing its complaint on the grounds of

> comity, by reason of the ongoing suspension of payments proceedings in the courts of Mexico. We affirm for substantially the reasons set forth in the opinion of the district court.

App. at 15a-16a.

REASONS FOR GRANTING THE WRIT

I. THE DISMISSAL OF PETITIONER'S ACTION "AT LAW" ON THE GROUND OF "INTERNATIONAL COMITY" WAS IMPROPER.

In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), this Court held that "federal courts have power to dismiss or remand cases based on abstention principles only where relief being sought is equitable or otherwise discretionary," 517 U.S. at 731 (emphasis added), and that "we have applied abstention principles to actions 'at law' only to permit a federal court to enter a stay order that postpones adjudication of the dispute, not to dismiss the federal suit altogether." *Id.* at 719.

The first question presented is whether the rule articulated in *Quackenbush* applies equally where abstention is sought on the ground of "international comity." This important question was not reached by this Court in its earlier decision in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). There, the Court held that the decision "to refrain from the exercise of jurisdiction on grounds of international comity" -- "or, more precisely, abstention," 509 U.S. at 820 (Scalia, J., dissenting) -- required a threshold showing of whether "there is in fact a true conflict between domestic and foreign law." 509 U.S. at 798-99.

Although this Court has in the past addressed several aspects of the concept of "international comity," it has not considered the question presented here. The factual circumstances in which this cases arises, however, are likely to present themselves with ever greater frequency as cross-border trade between United States and foreign nationals increases, and as the lower federal courts increasingly confront issues involving debtor protection laws of foreign nations. This "run-of-the-mill contract dispute,"

Quackenbush, 517 U.S. at 729, in which a federal court has jurisdiction over a state law cause of action based solely on the diverse citizenship of the parties, raises fundamental issues concerning the right of a domestic plaintiff with a domestic cause of action to seek a remedy in the courts of its own nation, the duty of a federal court to exercise the jurisdiction conferred upon it by Congress, and the legal regime governing a federal court's adjudication of motions to dismiss (or stay) based upon "international comity."

Because the judgments below are in conflict with this Court's settled jurisprudence regarding the obligation of a federal court to exercise its jurisdiction, because the Circuit Courts of Appeal that have considered this question are divided with respect to the propriety of dismissal, and because the courts below, by dismissing Petitioner's claims, granted Respondents greater relief than they would have been entitled to under Mexican law, this Court should grant the Petition and review the judgments below.

A. Where the Plaintiff's Action is "at Law," a Federal Court Lacks the Power to Dismiss on the Ground of "International Comity."

This Court has repeatedly held that "abstention" doctrines are "the exception, not the rule," of federal subject-matter jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Indeed, as regards a district court's obligation to exercise the jurisdiction conferred upon it by Congress, the Court's holdings on this subject now border on the absolute: "Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989) ("*NOPSI*") (emphasis added; citing cases). At the same time, the Court has recognized that in exercising the

jurisdiction given to it, a federal court in a particular case may have discretion "in determining whether to grant certain types of relief." *Id.* at 359. Where the remedy sought by the plaintiff is not discretionary, however, the Court has held that "we have permitted federal courts applying abstention principles in damages actions to enter a stay, but we have not permitted them to dismiss the action altogether." *Quackenbush*, 517 U.S. at 730; *see also Warmus v. Mehlan*, 517 U.S. 1241 (1996) (vacating and remanding judgment of dismissal on "*Younger*" abstention grounds "in light of *Quackenbush*").

The source of a federal court's "power" to dismiss on abstention grounds "derives from the discretion historically enjoyed by courts of equity," *Quackenbush*, 517 U.S. at 727-28, and is "the common-law background against which the statutes conferring jurisdiction were enacted." *NOPSI*, 491 U.S. at 359. In the domestic context, the restrained exercise of that power is informed by considerations of proper constitutional adjudication (i.e., adjudication of U.S. constitutional issues) and federalism. *See, e.g., Younger v. Harris*, 401 U.S. 37, 44 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). However, the aspects of federal-state "comity" that underlie domestic abstention cases plainly will not support an extension of those exceptions to the field of "international" comity. In sum, where the relief sought by a plaintiff is not discretionary, *Quackenbush* implies that a federal court is without the "power" to dismiss on grounds of "international comity."

The courts below cited this Court's decision in *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527 (1883), for the proposition that a domestic court will defer to a foreign bankruptcy proceeding by dismissing a domestic plaintiff's claim in the interest of "international comity." App. 10a-11a. The salient fact in *Canada Southern Railway*, however, was that the foreign "scheme of arrangement" in question

(whereby the plaintiffs' original bonds were exchanged without their consent for new bonds, which were not in default) had already been adopted and approved by the Canadian parliament by the time that the plaintiffs brought suit in federal court. The Court held that the compulsory Canadian "scheme of arrangement" barred plaintiffs' suit on the original bonds. *Id.* at 539.

But the dismissal in *Canada Southern Railway* plainly was not an "abstention"; rather, the Court found that plaintiffs' cause of action had been mooted by the supervening act of the foreign legislature that had created the railway that had issued plaintiffs' bonds in the first place. 109 U.S. at 538-39. (No such supervening act of a Mexican court or the Mexican legislature is in question here.) The decision in *Canada Southern Railway* is therefore but an instance of the recognition and enforcement of a foreign legal act, and fits comfortably within this Court's now-familiar definition of "international comity" as

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164 (1895) (emphasis added) (declining to recognize and enforce a judgment of the courts of France on the ground that French courts would not reciprocally recognize the conclusiveness of a domestic judgment).

As the above quotation from *Hilton* suggests, the question of whether foreign proceedings warrant "comity" is distinct from the question of whether such comity, if warranted, also justifies abstention. Petitioner therefore need not dispute that a federal court may grant "comity" to the acts and decisions of a foreign tribunal if the requirements of

Hilton are satisfied. Neither *Hilton* nor *Canada Southern Railway*, however, supports the further proposition that a federal court may dismiss a plaintiff's domestic cause of action "at law" in deference to a foreign proceeding where that proceeding has yet to result in a judgment.

In the more than one hundred years since *Hilton* and *Canada Southern Railway* were decided, and most strikingly in recent years, the means and devices by which federal courts have thought to afford "comity" to other nations have grown more varied than the simple recognition or enforcement of foreign judgments. However, the lower federal courts must, in the era of an emerging "global economy" and concepts like "cross-border insolvencies," still look to decisions by this Court from the 19th Century for guidance concerning "international comity." At the same time, this Court's "abstention" cases, culminating in *Quackenbush*, have taught that the power of a federal court to decline to exercise the jurisdiction constitutionally conferred upon it by Congress is sharply limited. This Petition presents the Court with the occasion to lend its guidance with regard to the rule governing federal court abstention in the international arena, and should be granted.

B. The Circuit Courts of Appeal Are Divided With Respect To The Propriety of Dismissal on the Ground of "International Comity."

A stay, rather than dismissal, is in fact the remedy that has been applied, often under the name "international abstention," by several other circuit courts in cases wherein "international comity" was requested. *See, e.g., Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1222-23 (11th Cir. 1999) (in a case of first impression, distinguishing *Quackenbush* as a "federalism" ruling, but reversing judgment of dismissal in favor of a stay on the ground that "our jurisprudence in this area does not dictate that we

should dismiss cases" involving foreign parallel proceedings); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987); *see also Philadelphia Gear Corp. v. Phila. Gear de Mexico, S.A.*, 44 F.3d 187 (3d Cir. 1994) (remanding for further findings; party seeking a stay "must demonstrate [that] (1) the foreign bankruptcy case shares our policy of equal distribution of assets; and (2) the foreign law mandates the issuance or at least authorizes the request for stay"); *Boushel v. Toro Co.*, 985 F.2d 406 (8th Cir. 1993) (stay on the ground of "international comity" was not an appealable final order; dismissing appeal but approving issuance of stay in dictum).

On the other hand, the Fourth Circuit Court of Appeals apparently agrees with the Second Circuit that a domestic cause of action may be dismissed on "international comity" grounds. *Meisel v. Ustaoglu*, No. 00-1552 (4th Cir. March 6, 2001) (unpublished disposition; available on Westlaw, 2001 WL 218793).[4]

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[4] We note that neither the Fourth Circuit nor the Second Circuit has affirmed such a dismissal and distinguished *Quackenbush*. Of course, this does not detract from the impact of the judgments below on the litigants. In Petitioner's case, its claims in the aggregate amount of some $18,000,000 plus default interest and costs, have been cast into limbo by the decisions below, leaving Petitioners with no assurance when (or indeed, whether) they will ever be decided. The effect on Petitioner's business, which depends upon the regularity of the financial transactions that it enters into and the predictability of the negotiable instruments that Petitioner deals in, is particularly severe.

From a systemic point of view, moreover, the existence of "unreported" decisions that dismiss a party's claims on novel legal theories creates a substantial risk that a parallel "shadow" jurisprudence will develop, effectively concealing certain decisions from review. The fact that the

The split among the circuits is illustrated most strongly by the decisions of the Second and Third Circuit Courts of Appeal, the two courts which have had occasion to develop the most extensively cited lines of authority in this area. That conflict, moreover, implicates fundamental questions concerning the uniform treatment that a domestic plaintiff might justifiably expect to receive when confronted with a foreign insolvency proceeding. This is not an area of the law in which regional variations among the circuits might be considered insignificant or even desirable. The "comity" at issue here is the "comity of nations," and there is nothing to recommend a difference in treatment between two domestic nationals based merely upon the venue where they happened to commence their domestic causes of action. That is, a domestic plaintiff that is also a creditor in a foreign proceeding should not expect to have its case dismissed rather than stayed on "international comity" grounds merely because the plaintiff brought suit in New York rather than in New Jersey.

Thus, in the Third Circuit, the court will authorize a stay, but not a dismissal. *See Philadelphia Gear Corp. v. Phila. Gear de Mexico, S.A.*, 44 F.3d 187 (3d Cir. 1994). Such a stay is considered to be justified not as a matter of "deference" to a foreign proceeding (as is the case in the Second Circuit)[5], but simply as a matter of recognizing and enforcing a foreign judgment. In the Third Circuit, if the

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Second Circuit declined to report the reasoning behind its affirmance of the District Court's judgments of dismissal, except to state that it was "for substantially the reasons set forth in the opinion of the district court," App. at 16a, thus argues for, rather than against, granting this Petition.

[5] *See, e.g., Pravin Banker Assocs., Ltd. v. Banco Popular del Peru,* 109 F.3d 850, 853 (2d Cir. 1997).

foreign bankruptcy "shares our policy of equal distribution of assets," *Philadelphia Gear*, 44 F.3d at 193, a domestic stay may issue where "foreign law mandates the issuance or at least authorizes the request for the stay." *Id.*

Further, according to the Third Circuit, the interests of international comity are best served by first proceeding to judgment on the domestic claim and by attempting to have that judgment recognized abroad. *Remington Rand Corp.–Delaware v. Bus. Sys. Inc.*, 830 F.2d 1260, 1273 (3d Cir. 1987). If the foreign court declines to recognize the domestic judgment, however, the trial court is then free to "to reconsider a proper remedy." *Id.* On the other hand, if the foreign court does recognize the domestic judgment, any domestic attachments can be lifted (in whole or in part), in order to provide assets for distribution by the trustee in the foreign proceeding. *Id.* (concluding that "the solution to this very difficult problem must follow four discrete steps"). In this manner, the Third Circuit thus held that affording comity to a Dutch "suspension of payments" proceeding was appropriate:

> But only if and to the extent that the Dutch court is willing to recognize the American judgment in its proceedings. This solution would afford appropriate protection to an American creditor, yet also acknowledge the primary role of the Dutch court in equitably distributing the available funds.

Remington Rand, supra., 830 F.2d 1260, 1273 (3d Cir. 1987).

The Second Circuit, by contrast, declines generally to uphold domestic attachments against the claims of a foreign trustee in liquidation, *Cunard S.S. Co. Ltd. v. Salen Reefer Serv. AB*, 773 F.2d 452, 457 (2d Cir. 1985), and, as the instant case demonstrates, will dismiss a domestic plaintiff's claim without regard to whether the foreign court will

ultimately adjudicate the claim. This leaves the domestic claimant at best with possibly insurmountable statute of limitations issues to contend with at a later date and at worst with no recourse whatever. Unlike the Third Circuit, which focuses pragmatically on what a foreign court *does* with a domestic claim in a particular case, the Second Circuit confines its analysis of foreign law to a more or less abstract review of the letter of foreign law and its "fundamental procedural fairness."[6] *Id.*

To resolve the conflict between the circuits and to articulate a uniform rule that should apply in all cases where abstention is sought on the ground of "international comity," Petitioner respectfully requests that this Court grant the Petition.

C. The Judgments Below Cannot be Supported on the Alternative Ground of *Forum Non* Conveniens.

Finally, Petitioner briefly addresses an issue identified in *Quackenbush* itself, namely, whether the judgments below could be supported on the alternative ground of *forum non conveniens*. 517 U.S. at 721-23. As *Quackenbush* states, federal courts "abstain out of deference to the paramount interests of another sovereign," whereas

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[6] As an ironic consequence, in this case, by the time the District Court had concluded that the LQSP was fundamentally "fair," the Mexican Government – by repealing the LQSP – had concluded that it was not. (This turn of events moreover illustrates that where it is the foreign policy of the United States to encourage reform in another nation's laws, a federal court, by declaring that a foreign law is "fair," may actually be working counter to our national interest in "international comity.")

forum non conveniens "has historically reflected a far broader range of considerations." *Id.* (citations omitted). Below, however, none of the parties and neither of the courts ever purported to address "the multifarious factors relevant to the forum non conveniens determination," *American Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994), and the record would not support affirmance of the judgments on that alternative ground.

II. WHETHER FEDERAL OR STATE LAW GOVERNS ABSTENTION IN A "DIVERSITY" CASE.

Petitioner also seeks review of the decisions below that the "decision, whether or not to grant comity, is to be determined under New York state law." App. at 5a. Such a holding appears to be unprecedented as the basis for a federal court to decline to exercise jurisdiction conferred by Congress; is in conflict with decisions of the Seventh and Eleventh Circuit Courts of Appeals, both of which have held that the issue of "international abstention" is one of federal law, *see Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 n.7, 1520 n.7 (11th Cir. 1994); *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680, 685 n.1 (7th Cir. 1987); and is inconsistent with this Court's rulings in abstention cases, *see, e.g., Quackenbush, supra*, 517 U.S. at 709.

As the lengthy footnote in the District Court's opinion indicates, App. at 5a n. 3, its holding (which was affirmed by the Second Circuit) is an extension of the Second Circuit's substantial and widely cited jurisprudence concerning "international comity" in various contexts. Thus, a federal court in the Second Circuit with diversity jurisdiction in an "international comity" case may now be obliged to apply state law in deciding whether to exercise the jurisdiction given to it by Congress. Moreover, because the

Second Circuit -- and the Southern District of New York in particular -- is one of the most active venues in the country for international litigation, decisions emanating from their courts are particularly influential in this regard. This Court should grant Petitioner's application for review of the second question presented because of the potential for widespread judicial misadventure that the decisions below create with respect to the proper exercise of federal jurisdiction.

A. Federal Law Controls the Question of Abstention by a Federal Court, Including on the Ground of "International Comity."

A motion to dismiss on the ground of "international comity" asks the district court to "refrain from the exercise of jurisdiction," *Hartford Fire Ins. Co.*, 509 U.S. at 820.

When a motion is made to a federal court to abstain from exercising its jurisdiction (including diversity jurisdiction), federal law controls. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 709 (1996) (diversity jurisdiction); *cf. Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202-03, 76 S.Ct. 273, 276 (1956) (a federal court enforces a state-created right by "rules of procedure which it has acquired from the Federal Government"); *see also Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1520 n.12 (11th Cir. 1994) ("the abstention question is a matter of federal law"); *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961) ("In determining its own jurisdiction, a District Court of the United States must look to the sources of its power and not to acts of states which have no power to enlarge or to contract the federal jurisdiction."). This "basic principle of Federalism" is not affected by the *Erie* doctrine. *Grand Bahama Petroleum Co., Ltd. v. Asiatic Petroleum Corp.*, 550 F. 2d 1320, 1325 (2d Cir. 1977); *cf. Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) ("That right was

granted by Congress and cannot be taken away by the State."); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 125 (1981) ("the jurisdiction of the lower federal courts is subject to the plenary control of Congress") (Brennan, J. concurring).

The decisions of the courts below are in conflict with this Court's decisions, and review should be granted in that regard.

B. In a Diversity Action, State Law Considerations of "International Comity" Pertain Only to Issues of "Private International Law."

A brief review of the case law upon which the courts below relied, see App. at 5a-6a, illuminates where and how the District Court (as affirmed by the Second Circuit) went astray, and why similar error elsewhere may well follow upon the same or a similar rationale.

The term "international comity" encompasses several distinct doctrines, including adjudicative comity, "or more precisely, abstention," *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 820 (Scalia, J., dissenting); "prescriptive" comity, or the exercise of a legislature's jurisdiction to prescribe, *id.*; as well as more familiar doctrines such as choice of law, the recognition or enforcement of foreign judgments, and the "act of state" doctrine. Only the first doctrine, adjudicative comity, pertains to the case at hand.

A fundamental error in the Second Circuit (including the courts below) has been to confuse these separate comity doctrines and to cite cases that deal with a distinct doctrine (*e.g.*, the recognition or enforcement of a foreign judgment) as "supporting" their holdings regarding the applicable choice of law.

The New York Court of Appeals had long ago recognized that the decisions of its courts were confined to

questions of "private" international law, *e.g.*, whether "our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights." *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 387, 151 N.E. 121, 123 (1926). Hence, New York state courts do not abstain on the ground of "international comity."[7]

Thus, none of the cases cited below, *see* App. 5a, 6a, dealt with "abstention" on international comity grounds, but were instead confined to the conceptually distinct "and irrelevant" "private international law" matters of (i) the recognition and enforcement of a foreign judgment, *see, e.g., Drexel Burnham Lambert Group Inc. v. Galadari*, 777 F.2d 877 (2d Cir. 1985); *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976); *SNR Holdings, Inc. v. Ataka Am., Inc.*, 54 A.D.2d 406, 408-09, 388 N.Y.S.2d 909, 911-12 (1st Dep't 1976); and (ii) whether New York attachments obtained by foreign corporation would be upheld against the claims of a

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[7] Indeed, New York law would prohibit a dismissal or stay of the actions here. With respect to the particular type of financial contracts at issue — *viz.*, promissory notes relating to an "obligation covering in the aggregate, not less than one million dollars" and containing a provision whereby a "foreign corporation . . . agrees to submit to the jurisdiction of the courts of this state," N.Y. Gen. Oblig. Law § 5-1402 (McKinney's 1989) — New York's law of *forum non conveniens* expressly prohibits the dismissal or stay of an action properly brought in New York. *see* N.Y. C.P.L.R. 327(a) (McKinney's 1990). This state law rule represents a legislative expression of the importance of maintaining New York as a financial and commercial center. *See* Sponsor's Memorandum in Support of Legislation (A.703-A)(1984) at 2, *quoted in* 2 Jack B. Weinstein, Harold L. Korn and Arthur R. Miller, *New York Civil Practice: CPLR* ¶ 327.04 at 3-588.

foreign trustee in bankruptcy. *Cunard S.S. Co., Ltd. v. Salen Reefer Serv., AB*, 773 F.2d 452 (2d Cir. 1985); *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987).

In the first group of such cases, the Second Circuit held that in a "diversity" case, New York private law of "international comity" provides the substantive rule of decision regarding the recognition and enforcement of a foreign judgment. That result is widely followed and need not be disputed by Petitioner here. In neither *Clarkson* nor *Drexel*, however, was the plaintiff's claim dismissed. In *Clarkson,* the Second Circuit confirmed the standing of the plaintiff (a foreign trustee in bankruptcy) to sue, and granted its motion for a preliminary injunction, 544 F.2d at 629-30, 633, while in *Drexel*, the Second Circuit actually reversed a judgment of dismissal and remanded the case for additional fact finding as to whether a "decree" of the Sultan of Dubai was enforceable as a foreign judgment under New York law. 777 F.2d at 881. No such enforcement issues are presented here.

In the second group of cases, New York law applied, not as the consequence of the district court's "diversity" jurisdiction, but because state law was expressly incorporated as the substantive rule of decision in specific federal rules and statutes regarding pre-judgment attachments.[8] Holding that New York law, which upholds the rights of a domestic attaching creditor against the claims of a foreign trustee in bankruptcy,[9] did not extend the same

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[8] *See, e.g.*, Rule B(1) of the Supplemental Admiralty Rule of the Federal Rules of Civil Procedure; *see also* Fed. R. Civ. P. 64. Jurisdiction in *Cunard* and *Victrix* was based on the Federal Arbitration Act, not diversity of citizenship.

[9] *See In re Waite*, 99 N.Y. 433, 448 (1865); *see also Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 582 (1908).

protection to the rights of a foreign attaching creditor, the Second Circuit in *Cunard* and *Victrix* held only that the district courts below did not abuse their discretion in discharging the attachments in favor of foreign bankruptcy proceedings. *Cunard*, 773 F.2d at 460; *Victrix*, 825 F.2d at 715. Neither court abstained from decision.

Petitioner has belabored the above decisions only to emphasize that the cases cited by the courts below were not "abstention" cases. Nonetheless, the Second Circuit has now created a doctrine which holds – erroneously – that the power of a federal court to dismiss a plaintiff's claim on the ground of "international comity" is controlled by state law. It appears to be the failure of the Second Circuit to address "international comity" as an abstention doctrine – notwithstanding this Court's decision in *Hartford Fire* – that led that court to search outside of federal law for the source of a power to dismiss. That search resulted in a fundamental error concerning an important question of federal law.

In sum, both the result (dismissal) and the jurisprudential rationale of the decisions below (application of a supposed pertinent New York "state law of comity") are wrong, and require this Court's review.

So firmly settled is this principle of New York attachment law, the New York Court of Appeals has held, "that perhaps it should not be changed except by the legislature." *Martyne v. Am. Union Fire Ins. Co. of Phila.*, 216 N.Y. 183, 193-94, 110 N.E. 502, 505-06 (1915).

III. WHETHER A DISMISSAL "UPON THE MERITS" CAN BE JUSTIFIED IN ANY EVENT ON THE GROUND OF "INTERNATIONAL COMITY."

Finally, Petitioner seeks to invoke this Court's general supervisory power to rectify the apparent dismissal of Petitioner's claims "upon the merits." *See* Fed. R. Civ P. 41(b).[10] Not only does such a dismissal with prejudice deny Petitioner its day in court on a claim over which the District Court indisputably had jurisdiction, but it forever closes the doors of the courthouse to Petitioner even if Respondents voluntarily discontinue the foreign proceedings, with respect to which Respondents sought "international comity" in the first place, before any judgment regarding the recognition of Petitioner's claims is rendered.[11] In a case of domestic abstention, this Court previously vacated such a dismissal as erroneous. *See American Trial Lawyers Ass'n, New Jersey Branch v. New Jersey Supreme Court*, 409 U.S. 467 (1973). Petitioner seeks a pronouncement and application of the same rule in a case of "international abstention."

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[10] Fed. R. Civ. P. 41(b) provides that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits."

[11] Of course, any dismissal in such circumstances will leave the domestic claimant with possibly insurmountable statute of limitations issues to contend with when it commences a new action.

In *Costello v. United States*, 365 U.S. 265, 285 (1961), this Court held that the phrase "lack of jurisdiction" in Rule 41(b) should be construed broadly to encompass any dismissal on a "ground not going to the merits." *See also* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2373 at 405 (2d ed. 1995). In *Quackenbush*, the Court held that "the question whether the federal court should decline to exercise its jurisdiction" is an issue that is "separate from the merits." 517 U.S. at 714. Plainly, if the dismissals below are based upon an "abstention" doctrine, the rationale of *Quackenbush* and *Costello* should require the dismissals to have been made "without prejudice."

The issue is complicated by the fact that although both sides briefed and argued the case in both courts below as an "abstention" case, neither court below adverted to "abstention" in its opinion. If this omission implied an intent to dismiss Petitioner's claims "upon the merits," such dismissals under Rule 41(b) would contradict the stated rationale of the decisions themselves, and call for the exercise of this Court's supervisory powers. Simply put, a federal court cannot "abstain" and at the same time dismiss a claim "upon the merits." Review of this question should be granted as well.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ECOBAN FINANCE LIMITED,
Plaintiff,

-against-

GRUPO ACERERO DEL NORTE, S.A. DE C.V.,
Defendants.

99 Civ. 10201 (AKH)

MEMORANDUM & ORDER DISMISSING CREDITOR'S CLAIMS BECAUSE OF COMITY

ECOBAN FINANCE LIMITED,
Plaintiff,

-against-

ALTOS HORNOS DE MEXICO, S.A. DE C.V.,
Defendant.

99 Civ. 10202 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff Ecoban Finance Limited filed this lawsuit to collect on a series of past-due promissory notes totaling $18 million. Ecoban is a New York corporation, and purchased the notes from defendants in Mexico. The notes provide that the parties consent to the jurisdiction of the courts of New York and Mexico for disputes arising thereunder, and that the law of New York will govern the notes unless suit is brought in Mexico, in which case Mexican law will govern.

Defendants are Mexican corporations. Grupo Acerero del Norte, S.A. de C.V. ("GAN") is a conglomerate, and Altos Hornos de Mexico, S.A. de C.V.

("AHMSA") is its subsidiary and Mexico's largest steel producer. Both are parties to Suspension of Payments ("*Suspensionón de Pagos*") proceedings in the Mexican courts,[1] proceedings, much like our Chapter 11 bankruptcy proceedings, intended to relieve debtors from the immediate pressure of creditors' claims and suits in order that they can reorganize their affairs, restructure their debts, and ultimately pay them.

Defendants AHMSA and GAN move to dismiss Ecoban's suits in this Court, pursuant to Fed. R. Civ. P. 12 (c). They ask me, for reasons of international comity, to defer to the Mexican proceedings and the stay of creditors' actions that are a feature of those proceedings. I grant defendants' motions and dismiss the complaints. Having examined the Mexican law on SOP's, and considered expert reports from each side, [2] I hold that the SOP's are not fundamentally procedurally unfair, or in violation of American public policy, and that comity is appropriate in the circumstances of these cases.

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[1]The *Suspensión de Pagos* ("SOP") proceedings are authorized under Title VI of the *Ley de Quiebras y Suspensión de Pagos* ("Law of Bankruptcy and Suspension of Payments") of Mexico. Plaintiff asserts that this law has recently been repealed and replaced by updated and more equitably balanced Mexican legislation, but concedes that the old law still applies to the SOP's of AHMSA and GAN. While these events may evidence Mexican dissatisfaction with the SOP, they do not directly bear on the inquiry this Court must make in deciding whether comity is appropriate in this case. *See infra.*

[2]Under Fed. R. Civ. P. 44.1, questions of foreign law are questions of law, not fact, and I may consider any relevant evidence of foreign law, whether or not it comports with the Federal Rules of Evidence. *See* Fed. R. Civ. P. 44.1; *Euromepa, S.A. v.*

I. Background

Between August and September 1997, GAN issued a series of eleven promissory notes in favor of Ecoban, payable in August and September 1999, in the aggregate amount of $15,000,000. On June 30, 1998, AHMSA issued three more promissory notes in favor of Ecoban, payable on July 6, 1999, in the aggregate amount of $3,000,000. Ecoban alleges that the notes are past due and entirely unpaid, and brought these suits to recover the $18 million due to it.

Defendants, in consequence of alleged adverse economic conditions and a decline in steel prices during 1998 and 1999 causing them financial distress, petitioned the Third Bankruptcy Court of Mexico City on May 18, 1999, in the case of GAN, and the Court of First Instance in Moclova, Mexico on May 24, 1999, in the case of AHMSA, for protection against creditors under the Mexican Suspension of Payments laws. GAN's and AHMSA's petitions were granted on May 24 and 25, 1999, respectively.

In brief, by these laws, Mexican courts are authorized to assist a debtor to avoid bankruptcy liquidation. When an SOP is filed, and the debtor is adjudged to be in suspension of payments by a Mexican court, debt collection actions against the debtor are stayed, and the debtor is precluded from making further payments

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R. Esmerian, Inc., 154 F. 3d 24, 28 n.2 (2d Cir. 1998). Accordingly, I have requested and reviewed expert reports from both sides on the nature of the SOP, and have independently reviewed the Mexican *Ley de Quiebras y Suspensión de Pagos.* Plaintiff offers the opinion of Jose Maria Abascal, Esq., an experienced attorney and professor of law, and defendants offer the opinion of Jamie Garcia Priani, Esq., who has equally impressive qualifications as a lawyer and scholar. *See* Report of Jose Maria Abascal, Esq.; Declaration of Jamie Garcia Priani.

to specific creditors. *See L.Q.S.P.* Art. 408-09 (Mex.) The debtor proposes a preventive agreement with its filing, *see id.* Art. 398, and, following notice to all creditors, the process of asserting and then adjudicating the legitimacy of individual claims begins. *See id.* Art. 405-407. A *sindico,* that is an appointee performing the functions of a caretaker or trustee, is appointed to supervise the debtor, and is charged with reporting illegal or inequitable conduct to the court, which has the power to force the offending debtor into liquidation. *See id.,* Art. 405, 416. The creditors have the power to appoint intervenors, *see id.,* Art. 417, and after the legitimacy of all claims is considered, the creditors meet to approve or reject the preventive agreement. If an agreement cannot be reached, the debtor is forced into liquidation. *See id.,* Art. 419. An agreement cannot be "crammed down," as is sometimes the case in American proceedings. *See* 11 U.S.C. §1129(b)(1); 4 Daniel R. Cowans, *Bankruptcy Law and Practice* §20.27 (6th ed. 1994). In general, an SOP resembles an American Chapter 11 reorganization.

II. Comity is Ordinarily Granted to Foreign Bankruptcy Proceedings

Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164 (1895). It is particularly appropriate and important with respect to foreign bankruptcy proceedings, where equitable principles demand that all claims against a debtor's limited assets be addressed in a single proceeding. *See Finanz AG Zurich v. Banco Economico, S.A.,* 192 F.3d 240, 246 (2d Cir. 1999) (granting comity to Brazilian liquidation proceeding); *Allstate Life Insurance Co. v. Linter Group, Ltd.,* 994 F.2d

996, 999 (2d Cir. 1993) (Australian liquidation proceeding); *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987) (Swedish bankruptcy); *Cunard Steamship Co. v. Salen Refer Services AB*, 773 F.2d 452, 458 (2d Cir. 1985) (Swedish bankruptcy). Consequently, "American courts regularly defer to such actions." *Finanz AG*, 192 F.3d at 246.

The decision, whether or not to grant comity, is to be determined under New York state law. There is diverse citizenship between plaintiff, a New York corporation, and defendants, Mexican, that is, foreign, corporations. *See* 28 U.S.C. §1332(a)(2). As subject matter jurisdiction in this matter is premised on diversity of citizenship, New York law governs. *See Drexel-Burnham Lambert Group v. A.W. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985); *Cunard*, 773 F.2d at 457.[3] But whether under federal law or New York law, the rule appears to be the same. Under New York law,

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[3]The parties have proceeded under the assumption that federal law governs the issue of comity. Proving the old adage about what happens when one assumes, however, Second Circuit precedent, as noted above, is to the contrary. The parties rely on recent Second Circuit cases such as *Finanz AG* and *Allstate Life Insurance*, which apply federal law to the issue of comity. In neither of these cases, however, was subject matter jurisdiction apparently based on diversity. *See Finanz AG*, 192 F.3d at 245 (finding subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §1330); *Allstate Life Insurance Co.*, 994 F.2d at 998 (discussing federal law claims on which actions were based). Neither case discusses choice of law issues, and neither holding upsets the rule of *Drexel* and *Cunard*, that state law comity principles apply in cases where subject matter jurisdiction is based on diversity. *See* Robert Laurence, *The Role, If Any, for the Federal Courts in the Cross-Boundary Enforcement of Federal, State and Tribal Money Judgments*, 35 Tulsa L. Rev 1, 21 (1999); Martin N. Flicks and Michael J. Ireland, *Bankruptcy and the Problems of Multi-Jurisdictional Workouts*, 592 PLI/Comm. 415, 449 (1991).

courts will defer to foreign bankruptcy proceedings unless the foreign court lacks jurisdiction over the bankrupt, or the foreign proceeding will result in injustice to New York citizens, prejudice to creditors' New York statutory remedies, or violation of the laws or public policy of New York. *See In re Waite*, 2 N.E. 440, 449, 99 N.Y. 433, 448 (N.Y. 1885); *SNR Holdings, Inc. v. Ataka America, Inc.*, 388 N.Y.S.2d 909, 911 (N.Y. App. Div. 1st Dept. 1976); *Cole v. Cunningham*, 133 U.S. 107, 122-23 (1890) (discussing New York law); *Drexel*, 777 F.2d at 880 (same); *Clarkson Co. v. Shaheen*, 544 F2d 624, 629 (2d Cir. 1976) (same). Federal law is to the same effect. *See Finanz AG*, 192 F.3d at 246. In short, comity should be granted to a foreign bankruptcy (or SOP) proceeding as long as fundamental standards of procedural fairness are observed, and state or federal law and public policy are not violated. *See id.* As discussed below, no expectations to the exercise of comity are applicable in this case.

III. Comity is Appropriate in this Case

It is undisputed that the Mexican courts are of competent jurisdiction, and indeed that Ecoban has, up to this point, participated in the SOP actions in Mexico. The only questions remaining are whether the SOP respects fundamental procedural fairness, and whether it violates federal or New York state law and policy. In my opinion, the Mexican law does not violate fundamental principles of procedural fairness, or the public policy of New York or of the United States, and I therefore hold that comity should be extended to the SOP's.[4]

[4]The parties make reference to the eight illustrative factors regarding procedural fairness as laid out in *Allstate Life Insurance*, 994 F.2d at 999. These factors generally indicate that the foreign procedures must provide adequate notice and opportunity to be heard, and must treat equal creditors equally, but most of the factors contemplate a liquidation and are not clearly relevant or applicable in the context of an SOP.

As the discussion of the SOP procedures above suggest, it is clear that creditors are given a legitimate opportunity to make their claims, and are afforded with avenues through which grievances may be raised and addressed during the SOP process. Nothing in the Mexican law indicates that the ability of foreign creditors to participate in the process is in any way limited, or that such creditors are otherwise treated differently from Mexican creditors. Nor do I find anything inherently unfair about the SOP process. It is true, of course, that through suspending debt payments and collection actions, and forcing the parties to renegotiate, the SOP could affect plaintiff's ability to collect on its promissory notes in full and when due. But this is not significantly more true in the Mexican SOP than it is in any bankruptcy setting, including American Chapter 11 reorganizations. Though some of the Mexican procedures may differ significantly from their American counterparts, it is not necessary for this Court to "split hairs to determine that the [Mexican] law, in general, provides a fair forum in which to litigate [plaintiff's] claims." *Allstate Life Insurance,* 994 F.2d at 999. It suffices to say that nothing in the Mexican law is so prejudicial as to offend the public policy of New York or the United States.

Indeed, plaintiff largely concedes the fairness of the Mexican law as written, and instead claims that American public policy is violated by the operation of the SOP in practice. Specifically, plaintiff, through its expert, contends that SOP adjudications can last up to 10 years, and that this potential for long delay in debt recovery forces major creditors to accept unfavorable terms on renegotiation, or risk no effective recovery at all. Defendants' expert disputes this assertion, claiming that most SOP's are in fact completed in one to three years. *See* Parini Reply Declaration ¶5. I needn't resolve this difference. These matters are complicated, and many competing interests

have to be balanced. Whether in a chapter 11 proceeding in our courts, or an equivalent proceeding in a foreign court, the potential for delay exists, and perhaps more delay than would be ideal. I do not find this potential offensive to the law or public policy of New York or the United States. Plaintiff does not claim any specific prejudice and, to the extent that AHMSA and GAN may soon emerge from suspension of payments, as plaintiff has asserted in oral argument and in various letters and submissions to the court, plaintiff's argument is even more speculative and less meritorious.

Along similar lines, plaintiff argues that AHMSA and GAN entered the SOP not because of financial or cash flow difficulties, but in a bad faith effort to force its major creditors to renegotiate their loans and thereby make AHMSA and GAN more attractive to potential merger partners. Allowing the Mexican companies to "get away with" this scheme, Ecoban urges, would violate American public policy. The proper inquiry on a comity motion, however, is not into the motives of a debtor in the foreign proceeding, but into the foreign court's ability to address, and redress, improper conduct. I am satisfied that there are sufficient opportunities for the creditors of AHMSA and GAN to raise the debtors' alleged bad faith and inequitable conduct before the Mexican tribunals hearing the SOP's, and those are the appropriate venues for plaintiff to do so. [5]

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[5] Submissions to the Court made subsequent to oral argument in this matter indicate that one aggrieved GAN creditor succeeded in overturning GAN's declaration of suspension of payments before the Superior Court of Justice of the Federal District of Mexico, a Mexican appellate court. By order dated June 20, 2000, that court vacated GAN's SOP declaration on the ground that GAN's proposed preventive agreement had not been previously approved by GAN shareholders, as required by Mexican law. *See* Opinion of Jose Maria Abascal, Esq. dated July 11,

Equally without merit is plaintiff's claim that comity is inappropriate because the promissory notes contain a forum selection clause designating New York as a forum for dispute resolution. It is well settled in this Circuit that such forum selection clauses will not preclude the exercise of comity. *See Finanz AG,* 192 F.3d at 247; *Allstate Life Insurance,* 994 F.2d at 1000. I also reject plaintiff's contention that the early conversion of plaintiff's claims into Mexican pesos under the SOP violates public policy. While it is true that a conversation procedure may be fundamentally unfair if it "would render a debt unenforceable or valueless," *Finanz AG,* 192 F.3d at 250, there is no reason to believe that this would be the case here. As the Second Circuit observed in *Finanz AG,* this provision for early conversion of claims is found in American bankruptcy law as well, *see id.;* 11 U.S.C. §502 (b), and absent the circumstance discussed above, nothing about such a procedure violates New York or United States public policy.

IV. Conclusion

In the end, we are left with the simple case of an American creditor of a Mexican corporation asking this Court to give it a preference over other creditors by

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2000, Exh. 1,2. The order vacating the GAN SOP, however, was stayed pending GAN's appeal by order of the Superior Court dated June 28, 2000. As a result of this stay, the GAN SOP remains in effect, and proceedings continue. *See* Declaration of Jaime Rene Guerra Gonzalez ¶¶9-10, Exh. C. Because GAN's SOP proceedings continue in Mexico, these events do not alter my comity analysis. In the event that a final judgment dismissing GAN's SOP petition is entered in Mexico, Ecoban will, of course, be free to re-file its claims in this Court. These proceedings, it appears, contradict plaintiff's argument that Mexican practice is ineffective to challenge a debtor's bona fides.

releasing it from the obligations imposed by Mexican bankruptcy law. Principles of international comity and a strong public policy favoring the administration of all claims against a debtor in a single forum preclude this Court from doing so. *See Cunard*, 773 F.2d at 459; *see also Credit Agricole Indosuez v. Rossivskiy Kredit Bank*, 729 N. E.2d 683, 94 N.Y.2d 541, 551 (N.Y. 2000) (following *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308 (1999), in holding that prejudgment creditor may not enjoin foreign debtor from dissipating assets, and disapproving of contrary practice of English courts under *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, 2 Lloyd's Rep. 509). The public policy and procedural fairness exceptions to the exercise of comity, under both New York and federal law, are intended as shields to protect American citizens and corporations from fundamentally unfair treatment abroad. They are not swords to be wielded by American creditors to frustrate and evade foreign bankruptcy laws.

As the Supreme Court observed over a century ago, in the context of a foreign bankruptcy reorganization:

> [E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and

> effect of their contracts with the corporation, will necessarily bind him .... It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

Canada Southern Ry. Co. v. Gebhard, 109 U.S. 527, 537-38 (1883).

In dealing with Mexican corporations, Ecoban can and must be charged with knowledge of the *Suspensión de Pagos,* a law that has been on the books since 1943. *See* Priani Reply Decl. ¶2. Ecoban's unhappiness with the results produced by that law is not a legitimate ground for denying the laws and courts of Mexico the comity to which American legal precedent and basic principles of international cooperation entitle them.

For the foregoing reasons, defendants' motion is granted, and plaintiff's complaints are dismissed on the ground of international comity. All attachments issued by the Court in these matters are dissolved, and all pending motions are denied as moot. The Clerk of Court is directed to mark these matters closed.

SO ORDERED.

Dated: New York, New York
August 8, 2000

S/

Alvin K. Hellerstein
United States District Judge

DOC # 39

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

———————————————————X

ECOBAN FINANCE LIMITED,
Plaintiff,

-against-

GRUPO ACERERO DEL NORTE, S.A. DE C.V.,
Defendants.

———————————————————X

ECOBAN FINANCE LIMITED,
Plaintiff,

-against-

ALTOS HORNOS DE MEXICO, S.A. DE C.V.,
Defendant.

———————————————————X

99 **CIVIL** 10201 (AKH)

Judgment

99 CV 10202 (AKH)

Defendants having moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(c) and the matter having come before the Honorable Alvin K. Hellerstein, United States District Judge, and the Court on August 8, 2000, having rendered its Memorandum and Order granting defendants' motion and dismissing the complaints, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated August 8, 2000, defendants' motion to dismiss is

granted and the complaints are dismissed; accordingly, these cases are closed.

Dated: New York, New York
August 11, 2000

JAMES M. PARKISON

Clerk of Court

BY:
S/_____
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 8/11/00

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE. A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of January, two thousand and one.

PRESENT: **Thomas J. Meskill,**
Pierre N. Leval,
Guido Calabresi,
Circuit Judges.

ECOBAN FINANCE LIMITED,
Plaintiff-Appellant,

v.

ALTOS HORNOS DE MEXICO, S.A. DE C.V. and GRUPO ACERERO DEL NORTE, S.A. DE C.V.,
Defendants-Appellee.

00-9062(L)
00-9074
(CON)

APPEARING FOR APPELLANT: Gilbert A. Samberg
Todtman, Nachamie,
Spizz & Johns
New York, N.Y

APPEARING FOR APPELLEES: Steven H. Reisberg
(Daniel B. Rosenthal,
Rachel J. Fremmer, on
the brief),
Wilkie, Farr &
Gallagher, New York,
N.Y., for defendant-
appellee Altos Hornos
de Mexico, S.A. de
C.V.

Gerald J. Fields
(Madlyn G. Primoff,
Kimberly J. Koerner,
and Erica G.
Weinberger, on the
brief),
Paul, Hastings, Janof-
sky & Walker, LLP,
New York, N.Y., for
defendant-appellee
Grupo Acerero Del
Norte, S.A. de C.V.

Appeal from the United States District Court for the Southern District of New York (Alvin K. Hellerstein, *D.J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is **AFFIRMED.**

Plaintiff Ecoban Finance Limited appeals from an

order of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, D.J.), dismissing its complaint on grounds of comity, by reason of the ongoing Suspension of Payments proceedings in the courts of Mexico. We affirm for substantially the reasons set forth in the opinion of the district court.

FOR THE COURT:
ROSEANN B. MACKECHNIE
CLERK OF COURT

S/_____
By: Lucille Carr, Deputy Clerk